"A SPECIAL RESPONSIBILITY": EUROPEAN SEARCH EQUALITY AND THE AMERICAN RESPONSE

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I. INTRODUCTION

"Now, as a nation, we don't promise equal outcomes, but we were founded on the idea everyone should have an equal opportunity to succeed."[1]

In June of 2017, the European Commission levied the largest competition fines in its history against tech giant, Google.[2] The Commission ruled that Google was unlawfully taking advantage of its position as the preeminent search engine in Europe to buoy another one of its businesses by automatically placing search results from its price-comparison site, Google Shopping, at the top of user product searches.[3]

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[1] President Barack H. Obama, Remarks by the President at College Opportunity Summit (Dec. 4, 2014) (Transcript available at https://obamawhitehouse.archives.gov/the-press-office/2014/12/04/remarks-president-college-opportunity-summit).

[2] Press Release, European Commission, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance (June 27, 2017).

[3] *Id.*

On the day the fines were announced, Margrethe Vestager, the EU's Commissioner for Competition, explained the reasoning behind the fines in an interview with CNBC.[4] In her explanation, Vestager focused on Google's "dominance" of the search engine market and its use of this dominance to manipulate the internet price-comparison market in favor of Google Shopping.[5] According to Vestager, the fines were levied to protect market competition.[6] Challenging her reasoning, CNBC host Sara Eisen questioned whether Google should be punished for taking the steps necessary to succeed against the likes of Amazon and eBay.[7] While Eisen's rebuttal was a simple one, it is indicative of the different approaches taken by the United States and the European Union in addressing tech companies' bias in favor of their own products and lateral businesses.[8]

Since the beginning of the decade, the European Commission has challenged Google to comport with European laws enacted to prevent dominant companies from using their position to further profit themselves in other areas.[9] In contrast, the United States has done next to nothing to maintain a level playing field, particularly for search engines, which are utilized daily by a majority of American internet users.[10]

The European laws on which the Commission's decision was based, namely Article 102 of the Treaty on the Function of the European Union and Article 54 of the Agreement on European Economic Area ("EEA Agreement"), are competition laws similar to American antitrust statutes.[11] Both seek to prevent parties, particularly those in a position to dominate their market, from artificially reducing or handicapping

[4] *Maragrethe Vestager*, EUROPEAN COMMISSION, https://ec.europa.eu/commission/commissioners/2014-2019/vestager_en (last viewed on Feb. 2, 2019) (As the EC's Competition Commissioner, Vestager is responsible for "enforcing competition rules in the areas of antitrust, cartels, mergers, and state aid").

[5] Interview by Sara Eisen with Margrethe Vestager, European Competition Commissioner (Jun. 27, 2017).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Leo Keion, *Google hit with record EU fine over Shopping service*, BBC (Jun. 27, 2017), http://www.bbc.com/news/technology-40406542.

[10] Amanda DiSilvestro, *Who Uses Search Engines? 92% of Adult U.S. Internet Users [Study]*, SEARCH ENGINE WATCH (Aug. 11, 2011), https://searchenginewatch.com/sew/study/2101282/search-engines-92-adult-internet-users-study

[11] Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2008 O.J. C 115/47; Agreement on the European Economic Area, March 17, 1993, O.J. No. L 1,3.1994.

competition to the detriment of consumers.[12] Despite these similarities, American government agencies charged with enforcing competition laws have been unwilling to take action against such violations, with that of Google being the primary example.[13] This can be most obviously seen in the Federal Trade Commission's ("FTC") decision not to bring action against Google for biasing its searches to benefit its other business ventures, such as Google Shopping.[14]

Using the European Commission's action against Google as a case study, this note will examine whether a market-dominant search engine (in this case, Google) is permitted under U.S. law to give preferential search treatment to its collateral businesses, despite the potential harm to the market and consumers. The next section will examine, in greater detail, the Commission's investigation into Google's practices, its eventual ruling and justifications for it, and the United States' history of inaction against Google for providing preferential searches to its users. The following section will examine whether or not American law allows for a successful claim in a theoretical case against Google, and later possible laws that could be implemented or actions that could be taken to reform American antitrust law for the purposes of creating a more balanced market for all competitors.[15]

II. BACKGROUND OVERVIEW

This section will discuss the European Commission's decision to fine Google a record €2.42B for abuse of its market dominance as well as the statutes that formed the basis of that decision.[16] It will also discuss how the European Commission's action in this area has diverged from its American counterparts, namely the Federal Trade Commission ("FTC").[17]

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[12] Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2008 O.J. C 115/47; Agreement on the European Economic Area, March 17, 1993, O.J. No. L 1,3.1994.

[13] *See generally*, Memorandum from [Redacted] to FTC (Aug. 8, 2012) (regarding the FTC's pending decisions to bring charges against Google for their use of search biases).

[14] *Id.*

[15] The scope of this examination will be limited to anti-trust statutes and case law.

[16] Press Release, European Commission, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance (June 27, 2017).

[17] Memorandum from [Redacted] to FTC (Aug. 8, 2012).

A. European Commission's Investigations of Google (November 2010–June 2017)

Price-comparison site, "Google Shopping" (known first as "Froogle"), was established in December of 2002.[18] The site allows consumers to compare prices of similar or identical products from different sources, providing them with the most cost-effective search results.[19] Entering into a market with established brand names, the fledgling site struggled, leading one internal memo at Google to assert that "Froogle simply doesn't work."[20]

Between 2008 and 2013, Google began adapting its search results across Europe, as it did in the United States, in two major ways.[21] First, Google increased the exposure of Google Shopping by placing price comparisons from the site at the top of searches of Google's main search engine (google.com) for applicable products.[22] After placing price comparison results linked to Google Shopping at the top of Google searches, web traffic to Google Shopping skyrocketed and increased the site's advertising revenue.[23] Additionally, Google altered its algorithms to force rival price comparison websites out of the immediate view of Google search users.[24] By forcing results of its competitors' home pages on to subsequent Google search result pages, Google reduced users views of these sites exponentially.[25] European Commission surveys indicate that web traffic to links on the first page of Google's search results account for ninety-five percent of all users, while the first link on the second page accrues one percent.[26] By employing these practices,

[18] *Google Launches Shopping Site*, THE WALL STREET JOURNAL ONLINE (Dec. 12, 2002, 6:04 PM), https://advance.lexis.com/document/?pdmfid=1000516&crid=65eb1bd5-bf33-4b73-9dd7-7e37ddbe1eb3&pddocfullpath=%2Fshared%2Fdocument%2Fnews%2Furn%3AcontentItem%3A4F1H-0HS0-TWV6-932P-00000-00&pddocid=urn%3AcontentItem%3A4F1H-0HS0-TWV6-932P-00000-00&pdcontentcomponentid=280007&pdteaserkey=sr7&ecomp=kyffk&earg=sr7&prid=1391d86f-2be1-4f04-91d6-2a6ecd8c5b3b.

[19] *Id.*

[20] Press Release, European Commission, Antitrust: Commission fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Press Release, European Commission, Antitrust: Commission fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage

Google hampered competitors' ability to compete.[27]

In response to the reaction of competing price-comparison websites, the Commission opened proceedings against Google in November 2010.[28] The Commission's announcement stated, in part, that the Commission would investigate "whether Google ha[d] abused a dominant market position in online search" in its promotion of Google Shopping and demotion of rival sites.[29] Such actions, the Commission asserted, violate European anti-competition law.[30] In addition, the Commission also included several other potential violations related to Google's discrimination against rival businesses in its advertisements, including claims that Google had misused its phone software to the detriment of competitors.[31]

Reaching a "preliminary conclusion" on the illegality of Google's practices in March of 2013, Google and the European Commission discussed potential methods to bring Google into compliance with European antitrust laws.[32] Google proposed placing links from Google Shopping within a distinguishable frame, while noting that the information was "promoted" by Google and modifying its algorithm to increase competitors' visibility.[33] In February of 2014, Google increased its offer by assuring the Commission that it would make at least three links to competitive price-comparing websites visible in searches where Google Shopping links were promoted.[34] While the agreement temporarily alleviated the Commission's concerns, the Commission reinstituted its proceedings against Google, as well as parent company Alphabet, on July 14, 2016.[35]

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to Own Comparison Shopping Service (June 27, 2017).

[27] European Commission Fact Sheet IP/17/1784, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service – Factsheet (Jun. 27, 2017).

[28] *Id.*

[29] Press Release, European Commission, Antitrust: Commission Probes Allegations of Antitrust Violations by Google (Nov. 30, 2010).

[30] *Id.*

[31] *Id.*

[32] Press Release, European Commission, Antitrust: Commission Seeks Feedback on Commitments Offered by Google to Address Competition Concerns (Apr. 25, 2013).

[33] *Id.*

[34] Press Release, European Commission Press Release, Antitrust: Commission Obtains from Google Comparable Display of Specialized Search Rivals (Feb. 5, 2014).

[35] Vice President Joaqin Almuia, Statement at the Midday press briefing on Commission's Statement of Objections sent to Microsoft (Feb. 5, 2014); European Commission Press Release, European Commission, Antitrust: Commission Takes Further Steps in Investigations Alleging Google's Comparison Shopping and

After nearly a year of further investigation, the European Commission's inquiry into Google's search biases came to an end.[36] In a published memoranda, the Commission asserted that Google "abused its market dominance as a search engine by giving an illegal advantage to another Google product."[37] In its decision to fine Google, the Commission focused on the company's "market dominance" in the search engine market across all thirty-one countries within the European Economic Area ("EEA").[38] The Commission asserted that Google had controlled around 90 percent of the market share for general internet searches since 2008, when it first adopted its volatile search bias practices.[39] Since Google adopted these practices, the Commission had observed an exponential increase in web traffic to Google Shopping.[40] Since 2008, Google Shopping had increased traffic by about 45,000 percent in the United Kingdom, 35,000 percent in Germany, 19,000 percent in France, 29,000 percent in the Netherlands, 17,000 percent in Spain, and 14,000 percent in Italy.[41] During that same period, the Commission identified that price comparison websites competing with Google Shopping experienced decreases in web traffic as high as 92 percent in some countries.[42]

However, such patterns have not been limited to Europe, as they have also gained traction in the United States, where Google's practices of promoting Google Shopping and demoting its rivals were also implemented.[43] According to the FTC, between July of 2007 and 2008, Google Shopping skyrocketed from the seventh-most-trafficked price comparison site to the most-trafficked such site.[44]

Advertising-Related Practices Breach EU Rules (July 14, 2016); Press Release, European Commission, Antitrust: Commission Sends Statement of Objections to Google on Comparison Shopping Service; Opens Separate Formal Investigations on Android (April 15, 2015).

[36] European Commission Fact Sheet IP/17/1784, Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service – Factsheet (Jun. 27, 2017).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] Press Release, European Commission, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (Jun. 27, 2017).

[41] *Id.*

[42] *Id.*

[43] Memorandum from [Redacted] to FTC (Aug. 8, 2012), https://www.benedelman.org/pdf/ftc-google-8aug2012.pdf (regarding the FTC's pending decisions to bring charges against Google for their use of search biases).

[44] *See generally*, Memorandum from [Redacted] to FTC (Aug. 8, 2012), https://www.benedelman.org/pdf/ftc-google-8aug2012.pdf.

The basis for the European Commission's decision to fine Google came through two major laws: (1) Article 102 of the Treaty on the Functioning of the European Union, and (2) Article 54 of the European Economic Area (EEA) Agreement.[45] According to the European Commission's press release following its levying of Google's fine, both of these laws govern antitrust violations for parties holding a "dominant position" in their market.[46]

Article 102 of the Treaty on the Function of the European Union ("TFEU") was written as the bedrock document of the newly-established European Union.[47] Article 102 requires that leading businesses do not abuse the power they wield in their given markets to prevent competition or use that power to unfairly muscle itself into other areas.[48] Within its text, Article 102 provides examples of abuse within the Article's text and includes unfair pricing, intentionally limiting production, and price gouging.[49]

A violation of Article 102 occurs when: (1) the accused has a dominant market position, and (2) that dominant market position has been abused by the accused.[50] To determine whether the accused holds a dominant market position, the Commission must agree on a precise definition of what the market is. The Commission makes this determination by examining both the goods or services being provided, as well as the geographic parameters relevant in determining the competition against the accused.[51] Once the parameters of the relevant market are established, factors such as market share (when over 40%), ease of entering into the market, and size and resources of the accused company factor into whether the business has a dominant market position.[52] In this case, Google had acquired as much as 92% of the market share for search engines in EEA countries, achieving well over 40% in each of the EEA's 31 economic areas across Europe.[53]

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[45] Press Release, European Commission, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (Jun. 27, 2017).

[46] *Id.*

[47] *Antitrust: Overview*, EUROPEAN COMMISSION, http://ec.europa.eu /competition/antitrust/overview_en.html (last visited Feb. 2, 2019).

[48] *Id.*

[49] Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2008 O.J. C 115/47.

[50] *Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases)*, EUROPEAN COMMISSION, http://ec.europa.eu/competition/antitrust/procedures 102_en.html (last visited Feb. 2, 2019).

[51] *Id.*

[52] *Id.*

[53] Press Release, European Commission, Antitrust: Commission Fines Google

The Commission considers whether the company took action to "distort" the competition in deciding whether the dominant company has abused its dominance in a given economic market.[54] In its decision, the Commission ruled that Google used its dominant search engines to artificially promote its comparison-shopping website, at the expense of its competitors.[55] As a result, Google's actions constituted an abuse of its dominant power over the search engine market expressly forbidden by Article 102 of the TFEU, and violation of European anti-competition law.[56]

The latter statute, Article 54 of the EEA Agreement, makes illegal any action taken by a dominant market player that may artificially affect trade in any way.[57] Article 54 provides examples such as price gouging, limiting production of goods, and requiring other parties to make agreements unrelated to business in order to assure continued partnership with the dominant party.[58] The statute covers many of the same anti-trust infractions as Article 102 of the TEFU and was itself used in the Commission's claim against Google.[59] Once again, by using its success to artificially prop up Google Shopping, its own vertical business, Google was found to have abused its dominant market position.[60]

B. American Investigation into Google's Search Bias Practices

Not long after the European Commission began its investigation of Google's search applications, the United States' consumer protection agency, the FTC, began its own investigation into Google's alleged search biases.[61] In a complaint against the company, several price-comparing sites raised the issue of Google's favoritism towards Google

€2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (Jun. 27, 2017).

[54] *Antitrust Procedures in Abuse of Dominance (Article 102 TFEU cases)*, EUROPEAN COMMISSION, http://ec.europa.eu/competition/antitrust/procedures_102_en.html (last visited Feb. 2, 2019).

[55] *Id.*

[56] *Id.*

[57] Agreement on the European Economic Area, March 17, 1993, O.J. No. L 1, 3.1994.

[58] *Id.*

[59] Press Release, European Union, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (Jun. 27, 2017).

[60] *Id.*

[61] Vauhini Vara, *Were Google's Practices Anti-Competitive or Just Anti-Competitor*, THE NEW YORKER (Mar. 21, 2015), https://www.newyorker.com/business/currency/were-googles-practices-anti-competitive-or-just-anti-competitor.

Shopping to the FTC.[62] For two years, the FTC delved into Google's promotion of its own products and demotion of its competitors.[63] As part of the investigation, the FTC interviewed employees of Google and its competitors, while also conducting searches of its own to learn the extent of the affect that these practices had on Google Shopping's competitors.[64]

Ultimately, the FTC prepared an internal report in which it decided not to bring formal action against Google, either under Section 2 of the Sherman Anti-Trust Act or Section 5 of the FTC Act.[65] In the FTC's judgment, Google's practices were not designed to harm competitors.[66] Rather, just as Sara Eisen put it in her CNBC interview with Margrethe Vestager, Google took such action as a means of making its universal search engine a more efficient product to better compete in a crowded field.[67] By placing direct links to Google Shopping at the top of searches for products, Google allowed for the streamlining of a user's experience.[68] According to the FTC's determination, this structure would allow customers to accomplish their search goals more efficiently.[69] To the FTC, Google's actions served as "legitimate product improvements," and found no official wrongdoing in Google's placement of Google Shopping.[70]

III. ANALYSIS – AMERICAN LAW AND FAIR SEARCH RESULTS

A. Search Bias and American Law

This section will examine whether American law would allow for the regulation of search biases in its current state. While appearing to be based on the same logic and steps as EFEU Section 102 and Article 54 of the EEA Agreement, U.S. the current bulwark of American anti-trust law, Sherman Antitrust Act, does not appear to provide the government with the authority to stop Google from promoting its business over competitors.[71] The Sherman Antitrust Act is the law most likely to be

62 *Id.*
63 *Id.*
64 *Id.*
65 Statement of the Federal Trade Commission Regarding Google's Search Practices, *In the Matter of Google Inc.*, (Jan. 3, 2013), https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf (last visited Feb. 2, 2019).
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id*.
71 Consolidated Version of the Treaty on the Functioning of the European Union art. 102, 2008 O.J. C 115/47; Agreement on the European Economic Area, March

employed by the FTC in such a case against Google.[72] The Sherman Act is broken into two major sections: Section 1 of the Act is largely focused on precluding collusion between two or more parties to assure success in a given market, while Section 2 places more focus on unilateral actions taken by a single party to hamper competition.[73] Since it does not appear that Google took action with the assistance of any other party or entity, the FTC will likely bring its action under Section 2 of the Act.[74]

Section 2 of the Sherman Act establishes three different offenses that can be brought against defendants: (1) "monopolization," (2) "attempted monopolization," and (3) "conspiracy to monopolize."[75] Section 2 has previously served as the bedrock of anti-competition claims brought in federal court, including those involving major technology companies.[76] In *United States v. Microsoft Corporation*,[77] a landmark case before the D.C. Court of Appeals, the federal government brought action against blue-chip computer giant Microsoft. The government alleged that Microsoft violated Section 2 of the Sherman Act by creating a monopoly of computer operating systems and conspired to monopolize internet browsers in the midst of the tech boom at the turn of the millennium.[78]

The case came at the end of a series of actions by competitors against Microsoft spanning much of the 1990s.[79] The series of cases swirled around Microsoft's ground-breaking "Windows" operating system and its automatic installation on personal computers, or "PCs," which had begun to garner the ubiquitous presence in homes that they maintain to this day.[80] Before the D.C. Circuit on appeal was whether Microsoft's control of the operating system software market with its Windows operating system was the result of "monopolization" banned under Section 2 of the Sherman Act.[81]

17, 1993, O.J. No. L 1,3.1994.

[72] *The Antitrust Laws*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Feb. 2, 2019).

[73] *Id.*; 15 U.S.C. § 1 ("Every contract, combination in the form of trust or otherwise. . .is hereby declared illegal"); William F. Adkinson, Jr., et al., ENFORCEMENT OF SECTION 2 OF THE SHERMAN ACT: THEORY AND PRACTICE 2-3 (Federal Trade Commission, 2008).

[74] 15 U.S.C. § 2 (2019).

[75] 15 U.S.C. § 2 (2019); William F. Adkinson, Jr., et al., ENFORCEMENT OF SECTION 2 OF THE SHERMAN ACT: THEORY AND PRACTICE 2-3 (Federal Trade Commission, 2008).

[76] *See* United States. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[77] *Id.* at 45.

[78] *Id.* at 47.

[79] *Id.*

[80] *Id.*

[81] *Id.*

To establish whether Microsoft engaged in illegal monopolization, the D.C. Circuit employed the two-part test first formulated in *United States v. Grinnell Corp.*[82] To sustain a claim for a violation of Section 2's monopolization prohibition, the *Grinnell* test requires that: (1) the defendant corporation possesses a monopoly in the "relevant market" in question; and (2) this monopoly was maintained through the company's misuse of that monopoly power, rather than through acceptable means, to control the market.[83]

To establish the existence of Microsoft's operating system monopoly, the court first set out to ascertain the definition of two of the first factor's operative terms: "monopoly power" and "relevant market."[84] Although the Supreme Court in *United States v, E.I. du Pont de Nemours & Co.* asserted that a party's ability to manipulate the price of its goods beyond their competitors' ability to participate established a monopoly, later cases ruled the monopoly power may be inferred by showing a "dominant" share of the product's "relevant market."[85]

In defining what constitutes a "relevant market," the court in *Microsoft* took a relatively narrow approach.[86] Based on the Supreme Court's decision in *du Point*, the court considered only those products which are "reasonably interchangeable by consumers for the same purpose."[87] Greatly impacting Microsoft's market power, the court limited the relevant market to operating systems running on Intel processors, thus rendering Apple's OS operating system and "middleware" out of the scope of market definition.[88] Leaving out both of these operating systems out of the relevant market left Windows with a ninety-five percent share of the defined market, which the court deemed sufficient to prove monopoly power.[89]

Since the presence of a monopoly in itself does not establish monopolization claim, the court in *Microsoft* examined whether or not a

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82 *Microsoft Corp.*, 253 F.3d at 50.

83 United States v. Grinnell Corp., 384 U.S. 563, 570 (1966) ("(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident").

84 *Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

85 *Id.* (citing Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995)).

86 *Microsoft Corp.*, 253 F.3d at 52.

87 United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956) (examining Section 2 monopolization claims against defendant's cellophane business).

88 *Microsoft Corp.*, 253 F.3d at 52-54.

89 *Id.* at 52-58; *See also Grinnell Corp.*, 384 U.S. at 571 (ruling that 87% market share is sufficient for monopoly power).

monopoly was obtained through conduct that could be deemed exclusory to other members of the relevant market.[90] Determining whether the defendant has acted in an anti-competitive manner is established through a four-factor, shifting-sands test established in *Spectrum Sports, Inc. v. McQuillan*.[91] To prove anti-competitiveness, the plaintiff must demonstrate: (1) the defendant's actions had a negative impact on the "competitive process" and (2) that the harm sustained was meant to be prevented under the statute.[92] After meeting these two factors, the defendant is (3) given the opportunity to provide justification for its actions, after which (4) the onus returns to the plaintiff to establish that the harm pales in comparison to their "pro-competitive" benefits.[93]

In its own examination, the court in *Microsoft*, citing previous cases, asserted that "courts are properly skeptical about claims that competition has been harmed by a dominant firm's product design changes."[94] The court felt that ruling against certain design modifications would create a chilling effect on product innovation.[95] By integrating Internet Explorer to Windows 95, Microsoft made it impossible to delete its web browser, which served as the default browser in certain situations.[96] Competitors in the web browser market argued that having Internet Explorer integrated into ninety-five percent of the nation's computers would limit consumer options and harm competition.[97] Although it provided no such justification for why Microsoft precluded users from removing Internet Explorer from the software (in violation of Section 2), the D.C. Circuit Court deemed that the integration of Internet Explorer onto the Windows operating system, which then opened Internet Explorer automatically (despite the user's choice of another default browser), did have relevant technical justifications.[98] With Microsoft arguing that the default use of Internet Explorer would allow for a more user-friendly experience, which allowed "users to move seamlessly from local storage devices to the Web *in the same browsing window*."[99] Asserting that the government had not provided an adequate rebuttal to Microsoft's pro-business argument, the court found that the integration of Internet Explorer into Windows to be

[90] *Microsoft Corp.*, 253 F.3d at 58.
[91] *Id.* at 52-58*;* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).
[92] *Microsoft Corp.*, 253 F.3d at 58*; Spectrum Sports,* 506 U.S. at 458.
[93] *Id.* at 59.
[94] *Id.* at 65 (citing Foremost Pro Color, Inc. v. Eastman Kodak, Co., 703 F.2d 534, 544-45 (9th Cir. 1983)).
[95] *Id.* at 65.
[96] *Id.* at 64-65.
[97] *Id.*
[98] *Microsoft Corp.*, 253 F.3d at 67.
[99] *Id.*

a Section 2 violation.[100] The D.C. Circuit came to a similar conclusion in examining Microsoft's promotion of its own Java Virtual Machine ("JVM") over the JVM produced by Sun Microsystems, which Microsoft made incompatible with Internet Explorer.[101] The court, once again found that the pro-competitive nature of the promotion of its own product superseded the negative impacts placed on Sun Microsystems and the market and therefore was not a violation of monopolization laws.[102]

After completing its discussion of monopolization, D.C. Circuit Court moved to claims of "attempted monopolization" under Section 2 of the Sherman Act.[103] Like the monopolization test, the Supreme Court in *Spectrum Sports, Inc. v. McQuillan* established a three-part test for finding the existence Section 2 attempted monopolization, requiring that plaintiff: (1) establish that the defendant participated in "predatory or anticompetitive conduct"; (2) sought to create a monopoly; and (3) had a "dangerous probability" of obtaining such a monopoly.[104] Honing in on plaintiff's claims that agreements between Microsoft and main rival Netscape would give Microsoft a monopoly of the web browser market, the Circuit Court found that Microsoft had a "dangerous probability" of monopolizing the web browser market and overturned the lower court's ruling.[105]

Within the "dangerous probability" factor of the larger *Spectrum Sports* attempted monopolization test, a plaintiff must first show that the market it claims the defendant is attempting to monopolize can, in fact, be monopolized by a single entity.[106] To do so, a plaintiff has to (1) establish the relevant market to be monopolized, and (2) show that "substantial barriers" limit the entry of competition.[107] Quickly dismissing plaintiff's attempted monopolization claim, the court held that the parties did not properly establish the relevant market that Microsoft sought to monopolize.[108]

The court found no need to seek clarification of the definition for the market or to remand the case back to the lower court, repeating plaintiff's responsibility for establishing such a definition to demonstrate a

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100 *Id.*
101 *Id.* at 74-75.
102 *Id*. at 75.
103 Id. at 80; 15 U.S.C. § 2 ("Every person who shall . . . attempt to monopolize . . . shall be deemed guilty of a felony . . . .").
104 *Microsoft Corp.*, 253 F.3d at 80 (citing Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993)).
105 *Id.* at 80.
106 *Id*. at 81.
107 *Id*.
108 *Id.*

likelihood of monopolization in the future.[109] The court asserted that the government also fell short in establishing the "significant barriers" to enter into the market.[110] Standing alone, the government's failure to define the monopolized market was sufficient to dismiss the claim of monopolization.[111] Additionally, the government was unable to show the barriers erected by Microsoft gave them "the ability to lessen or destroy competition in that market," the standard set forth in *Spectrum Sports* to determine the requisite difficulty of entry, or that Microsoft would control such power as to make it impossible to enter into the market.[112] Despite the plaintiff's argument that such a purchase would have for Microsoft amounted to a significant barrier, asserting that it would create a preference for Microsoft among users in the absence of any recognizable alternative, the court found such findings insufficient to establish an insurmountable barrier.[113] As the *Spectrum Sports* test is conjunctive, the D.C. Circuit Court reversed the lower court's decision in favor of the plaintiff without discussing the merits of the first two factors.[114]

The court in *Microsoft* provides an important, tech-based example of how American courts would likely rule on Section 2 monopolization and attempted monopolization claims involving Google's search biases. In this case, it is likely that Google's promotion of Google Shopping would be reasonably interpreted as procompetitive. With limited barriers preventing parties from entering into field on the internet, a claim of § 2 monopolization and attempted monopolization claims against Google would not hold.

To examine a potential claim of monopolization in this case, a court would first return to the two-part monopolization test set forth in *Grinnell*.[115] Although it would be difficult to conclude that Google Shopping ever had a monopoly in the saturated online price comparison market, it is irrefutable that Google holds a monopoly over the internet search engine market, a relevant market that the FTC defines narrowly as "[h]orizontal, algorithm web search."[116] As the Supreme Court in *Grinnell* established, and the court in *Microsoft* reinforced, monopoly

[109] *Id.* at 81 ("we would normally remand this case . . . [a] remand on market definition is unnecessary, however, because the District Court's imprecision is directly traceable to the plaintiffs' failure to articulate and identify the evidence before the District Court . . . .").

[110] *Microsoft Corp.*, 253 F.3d at 82.

[111] *Id.*

[112] *Id.* at 82; Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[113] *Microsoft Corp.*, 253 F.3d at 82-83.

[114] *Id.* at 81-82.

[115] United States v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966).

[116] Memorandum from [Redacted] to FTC (Aug. 8, 2012)

power is often based on market share within the party's relevant market.[117] Research reports by web data analytics companies such as comScore indicate that Google represents 64 percent of the market share among desktop searches computers in February of 2016.[118] This market share was much higher than any of Google's competitors, with Bing, Yahoo, Ask, and AOL representing 21.4, 12.2, 1.7, and 0.9 percent of the market share respectively.[119] While not rising to the levels seen in *Microsoft* (ninety-five percent), cases do support finding monopoly power in companies with similar market shares to Google.[120] Based on these similar rulings, Google appears to hold a sufficient market share to be considered a monopoly, as it is the only company in their sector that controls more than twenty-five percent of the entire market.[121]

Since the court would like find Google to have monopoly power, the court would move on the second *Grinnell* factor: whether intentionally skewing search results in favor of a company's own vertical enterprises in the manner Google has would be considered monopolist.[122] As seen in *Microsoft*, as well as the FTC's previous dealings with Google, the deference paid by the courts and the FTC to design modifications and pro-competitive reasoning for the structure of a search engine's results, would leave most claims of biased search results outside of what has previously been deemed "monopolistic" activity.[123] For example, Google's promotion of Google Shopping did not cause the FTC to pursue legal action under Section 2; they asserted that Google provided numerous pro-competition and design-based arguments that would have rebutted any claim of a monopoly and thus the FTC was unlikely to succeed in a legal proceeding.[124]

In its argument before the Commission, Google asserted that

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117 *Microsoft Corp.*, 253 F.3d at 51.

118 Adam Lella, *comScore Releases February 2016 U.S. Desktop Search Engine Rankings*, COMSCORE (Mar. 16, 2016), https://www.comscore.com/Insights/Rankings/comScore-Releases-February-2016-US-Desktop-Search-Engine-Rankings.

119 *Id.*

120 *See* Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1207 (9th Cir. 1997) (holding that a company with 65 percent of the relevant market share had monopoly power).

121 Adam Lella, *comScore Releases February 2016 U.S. Desktop Search Engine Rankings*,, COMSCORE (Mar. 16, 2016), https://www.comscore.com/Insights/Rankings/comScore-Releases-February-2016-US-Desktop-Search-Engine-Rankings.

122 U.S. v. Grinnell Corp., 384 U.S. 563, 571 (1966).

123 Memorandum from [Redacted] to FTC (Aug. 8, 2012).

124 *Id.* (regarding the FTC's pending decisions to bring charges against Google for their use of search biases).

promoting its own vertical companies makes the search engine more efficient.[125] The founder of Google, Sergey Brin, asserted that, by using Google's main search engine to search for products, it is searching for results supported by Google, and the engine merely streamlines the process by staying on Google rather than jumping to another website.[126] Paired with several other arguments set forth to justify promotion of its own site, Brin's statement provides evidence of the procompetitive intent behind the decision to promote Google Shopping. According to prior case law, he is completely within his rights to take such actions in order to provide users with the most direct, streamlined experience possible.[127] When combined with the minimal cost the promotion of Google Shopping to consumers, rather than the competitors themselves, it appears that search engine biases are justifiable, and would not be considered monopolization under Section 2 of the Sherman Act.

When examining a potential attempted monopolization of the online price-comparison market, courts will likely find, as they did in *Microsoft*, that there are insufficient barriers to entering the aforementioned marketplace to establish a claim for attempted monopolization.[128] In attempting to establish Google's ability to drive parties out of the market, it is quite clear that plaintiffs would run into a challenge based on the level of competition Google faces in the online price-comparison marketplace. With regards to entering the market, the *Microsoft* court found that no significant barrier existed to enter the internet browser market, with limited overhead required to enter the market.[129] With large companies like Microsoft also occupying prominent positions in the comparison search market, it seems unlikely that a court would find that Google has the market power to drive parties out. With no evidence supporting an argument that Google could effectively use its power to dominate this market, it does not appear that a claim of attempted monopolization would be successful.

Although Google's search monopoly appears to be legal, with the configuration of Google's searches benefiting Google Shopping arising out of a competitive desire to improve search efficiency for users, a potential plaintiff might attempt to attack Google's search biases using a wrinkle in Section 2 monopolization law: the "refusal to deal."[130] Unlike

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125 *Id.*

126 *Id.*

127 *Microsoft Corp.*, 253 F.3d at 67.

128 *Id.* at 82; Spectrum Sports v. McQuillan, 506 U.S. 447, 456 (1993).

129 *Microsoft Corp.*, 253 F.3d 34 at 84.

130 1 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMP., TR. & MONO § 4:21 (4th ed. 2017).

cases such as *Microsoft* where the defendant sought to obtain a large swath of the market it was in, other Section 2 monopolization claims deal with a company's refusal to enter into agreements or interact with rival companies for the purpose of establishing or fortifying the former's monopoly.[131] A plaintiff may argue that Google's movement of its competitors to subsequent search pages has no purpose other than to push for a monopoly in the price-comparison field, violating the spirit of the doctrine. However, although earlier cases surrounding the refusal to agree may have benefitted such a claim, the presence of other search engines on the market and the Supreme Court's recent expansion of the right of companies to refuse to deal with rivals, limits the prospects for any such claim against Google.[132]

Cases under the refusal-to-deal method of reasoning began towards the turn of the century.[133] Supreme Court's first case in this line of decisions came in *United States v. Colgate & Co.*, where plaintiff brought suit against defendant's toiletries business for unlawful collusion.[134] In this case, establishing a line reasoning similar to other Section 2 monopolization claims, Justice James McReynolds established that businesses were free to choose to turn away business from whoever they pleased "[i]n the absence of any purpose to create or maintain a monopoly."[135] This case would be used to argue for unlawful refusal of business for much of the next century.[136] The Supreme Court ceased to use the method after *Aspen Skiing, Co. v. Aspen Highlands Skiing Corp.* in 1985.[137] In *Aspen*, the defendant, an operator of three of Aspen's four skiing mountains, refused to sell lift tickets to plaintiff, who was the operator of the final mountain.[138] In addition, defendant ceased sales of multi-mountain passes which included the fourth mountain after the two parties disagreed over how to split the proceeds from the promotion.[139]

131 2-25 ANTITRUST LAWS AND TRADE REGULATION §205.04 (2nd ed. 2012). *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the [Sherman Antitrust] act does not restrict the long-recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the party with whom he will deal.").

132 Verizon Comms., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

133 2-25 ANTITRUST LAWS AND TRADE REGULATION §205.04 (4th ed. 2017).

134 *Colgate & Co.*, 250 U.S. 300, 307 (1919).

135 *Id.* at 307.

136 *See*, Aspen Skiing, Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

137 *Id.*

138 *Id.*

139 *Id.*

The Court found the defendants in this case were in violation of Section 2 of the Sherman Act, asserting that "attempting to exclude rivals on some basis other than efficiency" was deemed an anti-competitive act.[140]

Despite these rulings, the Supreme Court greatly altered their viewpoint on company's refusing to work their with competitors in the Court's *Verizon Communs., Inc. v. Trinko* decision.[141] This decision was born in the wake of the 1996 Telecommunications Act, which set forth requirements that telecommunications providers share networks with companies seeking to move to their location. The plaintiffs, a group of AT&T customers, claimed that Verizon, originally the only provider in their area, responded to service complaints from AT&T customers only after it answered such complaints from Verizon customers.[142] In viewing *Aspen Skiing* more narrowly, the Court determined that "Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under the Court's 'refuse to deal' precedents."[143]

Moreover, the *Trinko* case presents similar facts to the FTC's potential suit against Google. As the facts apply to Google, *Trinko* demonstrates that such claims do extend to preferential treatment.[144] The claim at issue in *Trinko* did not focus on a refusal to serve, but rather that Verizon was Preferencing its own product over the competitor's product.[145] The *Trinko* decision, similar to the *Microsoft* decision preceding it, allows companies to take action at the expense of rivals insofar that such action can be shown to accomplish a legitimate business interest.[146] Since the FTC has explicitly mentioned that there are legitimate business interests of Google's restructuring of its website–mainly to promote Google Shopping–it would likely be deemed an acceptable means to improve the efficiency of user searches. Thus, a claim brought on the grounds of duty of service would likely fall short once again.[147]

B. A Potential Solution – Returning to the "Harvard" School of Antitrust Philosophy

As Section 2 is currently enforced, configuring search engines to

140 *Id.* at 605.
141 Verizon Comuns., Inc. v. Trinko, 540 U.S. 398 (2004).
142 *Id.* at 404-05.
143 *Id.* at 410.
144 *Id.*
145 *Id.* at 405.
146 *Id.* at 415-6.
147 Memorandum from [Redacted] to FTC 28 (Aug. 8, 2012).

produce search results biased towards the company's own vertical companies appear to be within the bounds of American antitrust law.[148] Despite previously rulings' appearance of support for such practice, the concept of search bias arguably offends the bedrock of the laws that provide little protection against it.[149] This can be seen clearly in the history of Section 2 of the Sherman Act. The Act coincided with the dissolving of several major corporations, and was signed into law during a period of great industrialization in America.[150] At the time, large businesses began purchasing every intermediate business necessary for the production of their goods.[151] Doing so allowed these businesses to keep a stranglehold on their concentrated economic power.[152] Born out of grassroots movements seeking to break up these trusts, the Sherman Act was signed into law with the goal of making products more affordable for consumers and wages more livable for workers.[153] Although undoubtedly successful since its implementation, the court's decision in *Microsoft* and subsequent cases seem to indicate the ability of modern technology to circumvent the Sherman Act and establish the type of artificial market control the Act seeks to eradicate.[154] This conflicts with the basis for antitrust law, and action must be taken to prevent such practices that harm competition. To correct this issue, courts could return to a more originalist interpretation of Section 2, one that recognizes the importance of protecting market competition. However, this would be inconsistent with the current decisions regarding antitrust cases that consider a net-positive to consumers.[155] The proven historical effectiveness of the originalist stance could return the enforcement of Section 2 to its intended goals, while preventing the internet from circumventing laws that were implemented before the concept of the internet was conceived.

Over the past five decades, the wide-ranging principles of the Sherman Antitrust Act, which began as a law for consumers and producers, have been replaced by a narrower school of thought, limiting

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[148] *See* 15 U.S.C. § 2 (2019); *see generally,* U.S. v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[149] *See*, 1-9 LAWS AND TRADE REGULATIONS §9.02 (2nd ed. 2017).

[150] 1 JULIAN O. VON KALINOWSKI, ET AL., ANTITRUST LAWS AND TRADE REGULATION § 9.02 (2nd ed., 2017)

[151] *Id.*

[152] *Id*.

[153] *Id*.

[154] *Id.*

[155] Thomas A. Piraino Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 346, 348-49 (2007).

the scope of the once-all-encompassing law.[156] In their declawing of the Sherman Act, the judicial system has created a climate which allows issues such as Google's search biases to slip through the cracks. By returning to this previous model, advocated by such groups as the "New Brandeis" academic movement, the courts can take action against the unlawful growth of corporate giants, including Google's unfair movement into the price comparison market on the back of its search engine's success.[157]

The original text of Section 2 of the Sherman Antitrust Act firmly placed focus on the actions of the provider, stating:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[158]

In a work published by the libertarian Cato Institute, antitrust scholars William Letwin and Hans Thorelli argue that "the passage of the Sherman Act was motivated by widespread hostility toward monopoly–considered to be detrimental to the interests of consumers *and* small business and also antithetical to democratic institutions."[159] For a majority of the statute's history, courts stood firm in decisions made under the Act by protecting both consumers and businesses.[160] Even the actions deemed illegal can be beneficial to consumers.[161] In his examination of this court philosophy, dubbed the "Harvard" school of antitrust theory, Professor Thomas A. Piraino provides examples of this line of decision-making in cases where antitrust violations are found despite being a net-benefit to consumers.[162] One of the most direct examples of this school of thought can be seen in Judge Learned Hand's opinion in *United States v. Aluminum Company of America* ("*Alcoa*"),

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156 *Id.* at 346-47.

157 David Dayen, *This Budding Movement Wants to Smash Monopolies*, THE NATION (Apr. 4, 2017), https://www.thenation.com/article/this-budding-movement-wants-to-smash-monopolies/.

158 15 U.S.C. § 2 (2018).

159 Robert L. Bradley Jr., *On the Origins of the Sherman Antitrust Act*, CATO INSTITUTE, https://object.cato.org/sites/cato.org/files/serials/files/cato-journal/1990/1/cj9n3-13.pdf (last viewed Feb. 2, 2019) (emphasis added).

160 Piraino, *supra* note 155, at 348-49.

161 *Id.*

162 *Id.*

before the Second Circuit Court of Appeals.[163]

In *Alcoa*, the defendant, a company that engaged in the production of both raw and finished goods made from iron, was sued for violating Sections 1 and 2 of the Sherman Antitrust Act, having amassed what its competitors argued was a monopoly over the market.[164] Owning more than 80% of its market share, the court found that several of the defendant's actions, such as buying up water sources, driving its prices below the market prices, and purchasing companies for the purpose of keeping out competition, violated the Sherman Antitrust Act.[165] In establishing its defense, particularly with regard to its ingot monopoly, Alcoa argued that the fostering of a business that provided low costs for its consumers and benefits for its investors was an overall positive venture. Such benefits, defendant argued, could not amount to a violation of the Sherman Antitrust Act.[166] In his opinion Judge Hand recognized the importance of competition to the markets, asserting that "[m]any people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy" for those holding the monopoly.[167] In accordance with the importance of such competition, Judge Hand asserts that "[i]t is settled . . . that there are some contracts restricting competition which are unlawful, no matter how beneficent they may be; no industrial exigency will justify them; they are absolutely forbidden."[168] This decision, having been made by one of the most influential judges of the time, reflects the courts' willingness to outlaw actions that negatively impacted competition regardless of the economic benefits. The decision in *Alcoa* is one of the most famous early Sherman Act cases and would hold for much of the first eighty years of the Act's existence.[169]

Despite the balanced protection of competition and consumers, the "Harvard" school of thought would be replaced in the 1970s by a judicial movement known as the "Chicago" school of antitrust philosophy.[170] In his article, *Legislative Intent and the Policy of the Sherman Act*, Judge Robert Bork examined the main purpose behind the creation and

[163] *Id*. at 349.
[164] United States v. Aluminum Co. of America, 148 F.2d 416 (2d. Cir. 1945).
[165] *Id.* at 432-36.
[166] I*d.* at 429.
[167] *Id.* at 427.
[168] *Id*.
[169] *See* United States v. Phila Nat'l Bank, 374 U.S. 321, 371 (1963) ("A merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial").
[170] Piriano, *supra* note 155, at 350.

implementation of antitrust law.[171] Bork asserted that "Congress intended the courts to implement . . . only that value we would today call consumer welfare . . . the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction."[172] Citing the decisions of Judge Learned Hand, including his *Alcoa* decision, Bork found that these rulings indicate that the Act was put in place to protect citizens from harm from corporations who use greed to limit consumer options, specifically referring to Judge Hand's reference to the consumer as "helpless."[173]

Bork's 1966 article and its argument would spark a revolution in thinking about the purpose and scope of antitrust law enforcement, furthered by some of the most influential circuit court judges of the last forty years including Judges Frank H. Easterbrook and Richard Posner of the Seventh Circuit.[174] Judge Posner lays out the Chicago school ideology as one that is focused around the protection of those purchasing goods within the market.[175] In his work, *The Chicago School of Antitrust Analysis*, Judge Posner asserts that actions such as selling goods below cost do not violate antitrust law, finding them to be an unsustainable business model that will eventually lead to a return to market competition after prices inevitably are raised.[176] With such powerful judicial figures leading the charge, the Chicago school flourished as the 20th Century came to a close with the once Bork-led D.C. Circuit's decision in *Microsoft* serving as a shining example of Chicago-style antitrust theory put to action. As previously seen, the procompetitive benefits of Microsoft's streamlining its products superseded the impact of competitive businesses in its marketplace, a decision that played a major role in the FTC's decision not to pursue action against Google.[177]

Despite the current move throughout the mid-1900s and early-2000s to the Chicago style and its most diehard backers, some prominent voices have begun pushing for a return to the Harvard school of thought, citing, among other things, the Chicago school's inability to account for the rise in internet monopolies. In an article for the *Wall Street Journal*, Economics correspondent, Greg Ip, compares the internet behemoths of Google, Facebook and Amazon to some of history's most recognizable

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171 Robert H. Bork, *Legislative Intent and the Sherman Act*, 9 J.L. & Econ. 7 (1966).
172 *Id.* at 7.
173 *Id.* at 8.
174 Piriano, *supra* note 155, at 350.
175 Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA L. REV. 925, 927 (1979).
176 *Id.*
177 *Microsoft Corp.*, 253 F.3d at 74-75.

monopolies, Standard Oil and American Telephone and Telegraph Company.[178] Google and its internet compatriots have a direct impact on the consumers of their products, unlike the companies that formed the purpose for the installation of the Sherman Act and its progeny.[179] As Ip recognizes, Standard Oil and American Telegraph's monopolization over products for sale on the marketplace led to impacts in other areas of the companies that were bad for consumers, even if the prices of their specific products, for example kerosene, did not rise themselves.[180] When using Google, however, companies appearing on the website are charged per click, while everyday users pay nothing.[181] In the face of such difficulties, "the probability of regulatory action—for now—looks low, largely because U.S. regulators have a relatively high bar to clear: Do consumers suffer?"[182]

In making such a statement, Mr. Ip recognizes the ineffectiveness of the Chicago school, which has declawed antitrust regulation by penalizing consumers. Despite this pessimism, a return to the Harvard school of thought could be the change that Mr. Ip, among others, seeks to create a more inherently fair internet market that drives competition as Congress originally intended. By returning to the Harvard school, companies across all industries will be required to act with fair competition in mind, as seen in *Alcoa*, rather than just consumer happiness.[183] Movements such as the "New Brandeis" calling for a return to this style could reduce the barriers of entry imposed by Google by making them illegal, just as originally intended by the Sherman Antitrust Act.[184]

IV. CONCLUSION

As this Note shows, it is unlikely that existing American law will provide the FTC or any other regulatory agency with the ability to bring legal action against Google, or any other search engine, for its use of biased methods to benefit lateral businesses. As Section 2 of the Sherman Antitrust Act has been interpreted in previous cases, most notably the D.C. Circuit's decision in Microsoft Corp., it appears that case law has remained deferential to a company's decision to modify its design.

178 Greg Ip, *The Antitrust Case Against Facebook, Google, and Amazon*, THE WALL STREET JOURNAL (Jan. 16, 2018), https://www.wsj.com/articles/the-antitrust-case-against-facebook-google-amazon-and-apple-1516121561.

179 *Id*

180 *Id.*

181 *Id.*

182 *Id.*

183 United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d. Cir. 1945).

184 Dayen, *supra* note 157.

Combined with potential pro-competitive arguments for such biased results that could be used by nearly any search engine seeking to provide similarly biased results, a § 2 claim would likely not meet the threshold necessary to bring a successful claim against Google in federal court. Despite the ineffectiveness of current laws, the judicial system can play a key role in requiring neutrality in search results. By meeting the original calling of the Sherman Act to protect markets as well as the consumers within them and in keeping with many holdings of antitrust cases throughout the first half of the 20th Century, the courts could create a climate that protects companies' abilities to compete in markets that are controlled largely by one company. In doing so, the government can bring action against dominant companies who use their power positions in one market to take control of another, as Google did through Google Shopping. By protecting competition, courts could eradicate such unfair market prices, in turn allowing more companies to compete for market shares, fostering competition that has been proven to bring about growth in markets more effectively than those controlled by single enterprises, and further benefiting both producers and purchasers in a market.